

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 17, 2008 Session

BILLY G. DEBOW, SR. v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Sumner County
No. CR425-2001 Dee David Gay, Judge

No. M2008-00580-CCA-R3-PC - Filed March 10, 2009

The petitioner, Billy G. DeBow, Sr., appeals the trial court's denial of his "Motion to Reopen Post-Conviction Petition" and "Amended Motion for Delayed Appeal/Motion to Reenter Petition for Post-Conviction Relief." He raises two intertwined issues: (1) that he was denied the right to appeal the denial of his petition for post-conviction relief, and (2) that said denial violates his right to due process which necessitates waiver of the time limit for filing a notice of appeal "in the interest of justice." After review, we dismiss the petitioner's appeal on the grounds that he failed to comply with the provisions for seeking review of a denial of a motion to reopen, he did not allege any grounds under which a post-conviction petition may be reopened, there is no entitlement to a delayed appeal from the post-conviction court's denial of post-conviction relief, nor is it in the interest of justice to waive the timely filing of a notice of appeal in the petitioner's case.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

Lance A. Wray, Hendersonville, Tennessee, for the appellant, Billy G. DeBow, Sr.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Lawrence R. Whitley, District Attorney General; and Sallie Wade Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The procedural history of this case is lengthy. The petitioner was convicted of first degree murder on May 20, 1999, and sentenced to life without parole. Soon thereafter, an amended judgment was entered sentencing the petitioner to life imprisonment. A motion for new trial was filed, followed by a direct appeal. On direct appeal, this court fully addressed each of the petitioner's

nine issues and ultimately upheld his conviction. State v. Billy Gene DeBow, Sr., No. M1999-02678-CCA-R3-CD, 2000 WL 1137465 (Tenn. Crim. App. Aug. 2, 2000). Permission to appeal was denied by the supreme court on March 12, 2001. On May 17, 2001, the petitioner filed a *pro se* petition for post-conviction relief and a *pro se* amended petition on September 10, 2002. Counsel was appointed and filed a second amended petition for post-conviction relief on October 21, 2002. The post-conviction court conducted an evidentiary hearing on December 16, 2002, and on December 20, 2002, entered an order denying the petition in all respects. On April 27, 2007, the petitioner filed a *pro se* “Motion to File a Delay[ed] Appeal” from that decision, and on February 8, 2008, counsel filed a “Motion to Reopen Post-Conviction Petition” and an “Amended Motion for Delayed Appeal/Motion to Reenter Petition for Post-Conviction Relief.” The trial court conducted an evidentiary hearing on the motions on March 3, 2008.

At the March 3, 2008 hearing, the petitioner’s post-conviction counsel testified that he practiced law in Indiana from June 1983 until July 1999 when he relocated to Tennessee. With regard to the case at hand, post-conviction counsel recalled that the post-conviction judge did not issue an oral ruling following the evidentiary hearing but later issued a written ruling. He said he spoke with the petitioner on “a couple” of occasions regarding the outcome of the proceeding, but he did not recall ever telling the petitioner that he was going to file an appeal. Post-conviction counsel testified that “based upon [his] review of the judge’s opinion, [he] didn’t believe that any appeal would be successful,” but he “did not understand that [his] obligation . . . on the post-conviction relief petition obligated [him] . . . to appeal that [denial.]”

Post-conviction counsel said that he told the petitioner he doubted whether an appeal would be successful but because the petitioner “was very upset about the entire proceeding . . . [, he was] reasonably sure that [the petitioner] would have appealed any decision regardless of whether there was a measure of success or not.” He stated that it was possible the petitioner might have had the impression counsel was going to file an appeal “[b]ecause [the petitioner] wanted to appeal no matter what[.]” Post-conviction counsel acknowledged that he did not file a motion to withdraw as the petitioner’s counsel and said that he “should have filed for an appeal” now knowing his obligation under Tennessee law. On cross-examination, post-conviction counsel testified that the petitioner’s mother left a note at his office at some point inquiring into the status of the petitioner’s case, but he did not follow up on it.

The petitioner testified that the judge did not issue a ruling on his post-conviction petition at the evidentiary hearing so he did not find out that his petition had been denied until almost a year later when he had his mother initiate a three-way telephone call with post-conviction counsel. The petitioner recalled that, during that conversation, post-conviction counsel told him, “[W]e’ve got to file an appeal . . . and . . . said he’d be in touch.” The petitioner elaborated that he asked post-conviction counsel if he would “be in touch” and send him a copy of what was filed, and counsel said that he would. The petitioner said he was left with the impression that post-conviction counsel would be filing an appeal for him. The petitioner testified that he never received anything from post-conviction counsel saying he was no longer representing him, and he did not find out that an appeal had not been filed until April 2007 when he “wrote the Criminal Court of Appeals in Nashville and

wrote the trial court here in Gallatin.” Upon learning that information, he filed a *pro se* petition for a delayed appeal. With regard to his motion to reopen his post-conviction petition, the petitioner said that his grounds for that motion were ineffective assistance of counsel and that the jurors did not know the full extent of what he could be sentenced to if found guilty.

At the conclusion of the hearing, the trial court made oral findings of fact and conclusions of law in denying the petitioner’s motions and filed an order to such effect on March 6, 2008. The court concluded, with regard to the motion to the reopen, that the petitioner did not satisfy any of the statutory grounds for reopening his post-conviction petition. The court also found, with regard to the motion for a delayed appeal, that the interests of justice did not require the granting of the motion because the petitioner had been afforded a meaningful opportunity to be heard on each of his allegations. It is from these denials the petitioner now appeals.

ANALYSIS

The petitioner argues that he was denied the right to appeal the denial of his petition for post-conviction relief because his attorney failed to file such appeal or withdraw from his representation of the petitioner. The petitioner asserts that the denial of his right to appeal violates due process; therefore, the time limit for filing a notice of appeal should be tolled in the interest of justice. For the reasons below, we conclude that the petitioner’s appeal must be dismissed.

We initially note that the petitioner’s notice of appeal stated he was appealing the lower court’s denial of his motion to reopen his post-conviction petition and motion for a delayed appeal. However, it appears that he may have decided not to challenge the denial of his motion to reopen as his arguments on appeal seem to only address the motion for a delayed appeal. In any event, we will address the denial of both motions because of the wording in the petitioner’s notice of appeal.

The statute governing motions to reopen post-conviction petitions provides that “[i]f the motion is denied, the petitioner shall have ten (10) days to file an application *in the court of criminal appeals* seeking permission to appeal. The application shall be accompanied by copies of all the documents filed by both parties in the trial court and the order denying the motion.” Tenn. Code Ann. § 40-30-117(c) (2006) (emphasis added). See also Tenn. Sup. Ct. R. 28, § 10(B); Graham v. State, 90 S.W.3d 687, 689 (Tenn. 2002) (“Accordingly, Tenn. Code. Ann. § 40-30-217(c) outlines four requirements for an appeal from a motion to reopen to be considered: (1) the timeliness of filing, (2) the place of filing, (3) the application to be filed, and (4) the attachments to the application.”). In the present case, the petitioner has failed to comply with the statutory requirements for seeking appellate review. Specifically, the petitioner failed to file an application for permission to appeal and instead filed a notice of appeal pursuant to Tennessee Rule of Appellate Procedure 3, and he filed such in the incorrect court in an untimely fashion.¹

¹The lower court’s order was filed on March 6, 2008. See Graham, 90 S.W.3d at 690-91 (determining that the ten-day statutory period begins to run on the date the trial judge’s order is filed in the trial court clerk’s office). The
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Tennessee Rules of Appellate Procedure 3 and 4 govern appeals as of right. An appeal as of right is not available for review of a lower court's denial of a motion to reopen a petition for post-conviction relief. See Tenn. R. App. P. 3(b); see also John Harold Williams, Jr. v. State, No. W1999-01731-CCA-R3-PC, 2000 WL 303432, at *1 (Tenn. Crim. App. Mar. 23, 2000), perm. to appeal denied (Tenn. Oct. 16, 2000). The failure of a petitioner to comply with statutory requirements governing review of a denial of a motion to reopen deprives this court of jurisdiction to entertain such matter. Id. at *1. "Neither the Post Conviction Procedure Act nor the Rules of the Supreme Court allow this Court to suspend the statutory requirements." Id.

Our supreme court has determined that a notice of appeal may be construed as an application for permission to appeal if it "contain[s] sufficient substance that it may be effectively treated as an application for permission to appeal." See Graham, 90 S.W.3d at 691. The court noted that, "[i]n general, the contents of an application for appeal must include the date and judgment from which the petitioner seeks review, the issue which the petitioner seeks to raise, and the reasons why the appellate court should grant review." Id. Here, however, the petitioner's notice of appeal does not contain sufficient substance, such as the issue the petitioner seeks to raise or the reasons why the appellate court should grant review, that it may be effectively treated as an application for permission to appeal. Accordingly, this court is without jurisdiction to entertain this matter.

Moreover, even had the petitioner properly invoked this court's jurisdiction, a review of the motion to reopen reveals, as was determined by the lower court, that the petitioner failed to allege a ground upon which such petition may be granted. Tennessee Code Annotated section 40-30-117 governs motions to reopen post-conviction petitions. A motion to reopen a prior post-conviction petition may only be filed if the petitioner alleges that: (1) a final ruling of an appellate court establishes a constitutional right that was not recognized as existing at the time of trial and retrospective application of the right is required; or (2) new scientific evidence exists establishing that the petitioner is actually innocent of the convicted offense(s); or (3) the petitioner's sentence was enhanced based upon a prior conviction which has subsequently been found invalid. Tenn. Code Ann. § 40-30-117(a)(1)-(3). It must also appear that "the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced." Id. § 40-30-117(a)(4). Our review of the petitioner's motion, as well as his argument at the hearing, reveals that he failed to allege a ground under which a post-conviction petition may be reopened.

As stated previously, the petitioner's notice of appeal stated that he was appealing, in part, the lower court's denial of his motion for a delayed appeal. However, his argument on appeal focuses on why he believes he is entitled to appeal from the post-conviction court's denial of post-conviction relief rather than why the lower court erred in its ruling. See Tony Alan Winsett v. State,

¹(...continued)

petitioner's notice of appeal was filed on March 17, 2008. See Tenn. Sup. Ct. R. 28, § 2(G). Thus, the notice was not filed within the ten-day statutory period.

No. W2007-00149-CCA-R3-PC, 2007 WL 2872357, at *2 (Tenn. Crim. App. Oct. 3, 2007) (discussing the difference between a delayed appeal and waiver of a timely notice of appeal).

A “delayed appeal,” set out in Tennessee Code Annotated section 40-30-113, can be granted when a post-conviction court finds that a petitioner was denied the right to appeal from the *original conviction*. Tenn. Code Ann. § 40-30-113(a) (emphasis added). This is clearly not the petitioner’s situation, as he had a direct appeal from his original conviction. Moreover, several panels of this court have addressed delayed appeals in the post-conviction context and determined that there is no entitlement to a delayed appeal from the denial of a petition for post-conviction relief. See Timothy A. Baxter v. State, No. W2006-01667-CCA-R3-PC, 2007 WL 2822905, at *3 (Tenn. Crim. App. Sept. 26, 2007); Jessie Hodges v. State, No. W2005-01852-CCA-R3-PC, 2006 WL 211829, at *2 (Tenn. Crim. App. Jan. 25, 2006), perm. to appeal denied (Tenn. May 30, 2006); Darrel D. Hayes v. State, No. 01C01-9604-CR-00163, 1997 WL 537079, at *3 (Tenn. Crim. App. Sept. 2, 1997).

However, those panels, in looking at Tennessee Rule of Appellate Procedure 4, noted that the requirement of a timely notice of appeal may be waived “in the interest of justice.” See Tenn. R. App. P. 4(a); State v. Scales, 767 S.W.2d 157, 158 (Tenn. 1989). This appears to be what the petitioner is requesting. As such, we summarize his argument as follows: He was entitled to an appeal as of right from the post-conviction court’s denial of post-conviction relief; he was denied that right, which he equates to a denial of due process, because of his post-conviction counsel’s ineffectiveness; he, therefore, asks this court to waive the timely filing of his notice of appeal in the interests of justice.

“In determining whether waiver is appropriate, this Court shall consider the nature of the issues for review, the reasons for the delay in seeking relief, and other relevant factors presented in each case.” Larry Coulter v. State, No. M2002-02688-CCA-R3-PC, 2003 WL 22398393, at *2 (Tenn. Crim. App. Oct. 21, 2003), perm. to appeal denied (Tenn. Mar. 8, 2004). Upon review, as we will address below, we conclude that the interests of justice do not require that we waive the timely filing of the petitioner’s notice of appeal.

First, we note that many of the allegations in the petitioner’s post-conviction petition were previously addressed by this court on direct appeal. Second, post-conviction counsel testified at the hearing that he examined the post-conviction court’s order and did not see any issues that would be successful on appeal. Third, in ruling on these two motions, the lower court reviewed the transcript of the evidentiary hearing and the petitions for post-conviction relief, considered the allegations of ineffective assistance against the petitioner’s trial counsel, and determined there was no deficient performance by counsel or any resulting prejudice to the petitioner. The lower court, therefore, gave the petitioner another “meaningful opportunity to be heard.” “All that due process requires in the post-conviction setting is that the defendant have the opportunity to be heard at a meaningful time and in a meaningful manner. In this case, [the petitioner] [was] not . . . denied the right to present his post-conviction claim.” Stokes v. State, 146 S.W.3d 56, 61 (Tenn. 2004) (citations and internal quotations omitted). Fourth, even though the petitioner asserts that he was under the belief that post-conviction counsel was filing an appeal on his behalf, by our count he waited approximately three

and a half years before inquiring into the status of his appeal. Most importantly, we have looked at the issues raised in his post-conviction petition and amended petition as well as the entire record, and it is our view that any appeal by the petitioner of the denial of his petition for post-conviction relief would have had no merit. In light of the above, we conclude that the interests of justice do not require waiver of the time for filing a notice of appeal.

CONCLUSION

Based upon the foregoing authorities and reasoning, we dismiss the appeal.

ALAN E. GLENN, JUDGE